FILED BY CLERK
MAR -8 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DANIEL PAUL RUIZ, Petitioner, v. HON. JANE L. EIKLEBERRY, Judge of the Superior Court of the State of Arizona, in and for the County of Pima, Respondent, and THE STATE OF ARIZONA, by and through the Pima County Attorney, Real Party in Interest.	)	2 CA-SA 2011-0002 DEPARTMENT A DECISION ORDER

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR20103475001

JURISDICTION ACCEPTED; RELIEF GRANTED

Michael J. Bloom, P.C.
By Michael J. Bloom — Tucson
Attorney for Petitioner

Barbara LaWall, Pima County Attorney
By Jacob R. Lines — Tucson
Attorneys for Real Party in Interest

¶1 Daniel Paul Ruiz filed a petition for special action seeking review of the respondent judge's order on appeal reversing the justice court's grant of his motion to suppress the statement he made to law enforcement. Because Ruiz has no remedy by appeal, we accept jurisdiction and, for the reasons stated, vacate the respondent judge's order. *See* A.R.S. § 22-375; Ariz. R. P. Spec. Actions 1(a).

¶2 Ruiz was arrested on suspicion of driving under the influence of an intoxicant (DUI) while impaired to the slightest degree, *see* A.R.S. § 28-1381(A)(1), and was taken to an Arizona Department of Public Safety (DPS) station. He refused to consent to a blood draw and asked to speak with his attorney. He then was permitted to make a telephone call, apparently to an attorney. After Ruiz finished the telephone call, he again refused the blood draw. A DPS officer obtained a search warrant to draw Ruiz's blood, performed the blood draw, and read Ruiz the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). Ruiz then answered questions the officer asked.[1] Ruiz did not expressly waive his right to remain silent or his right to counsel before doing so.

[1]Ruiz stated although he did not feel the effects of any alcohol or drugs, he had consumed four beers and had smoked marijuana within the preceding twenty-four hours.

¶3 Ruiz was charged with DUI and filed a motion to suppress, inter alia, his answers to the officer's questions. The justice court granted Ruiz's motion, concluding he specifically had invoked his right to counsel before questioning and had not waived that right. The state dismissed without prejudice the DUI charge against Ruiz and appealed the justice court's ruling to Pima County Superior Court. On appeal, the respondent judge reversed the justice court's ruling, determining Ruiz had not asserted his right to counsel unambiguously, had not requested that counsel be present during the officer's questioning, and had waived his right to remain silent by answering the officer's questions.

¶4 Ruiz argues the respondent judge erred by reversing the justice court's grant of his motion to suppress his statements, asserting those statements had been obtained in violation of his Fifth Amendment right to counsel and *Miranda*. Special action relief is warranted if the respondent abused her discretion. *See* Ariz. R. P. Spec. Actions 3(c). In determining whether the respondent abused her discretion, we must review the justice court's grant of Ruiz's motion to suppress because, if the justice court did not err, the respondent erred as a matter of law in reversing its order—thereby abusing her discretion. *State v. West*, 224 Ariz. 575, ¶ 8, 233 P.3d 1154, 1156 (App. 2010) (court abuses discretion if it commits error of law). Viewing the evidence in the light most favorable to upholding the justice court's ruling, *see State v. Fornof*, 218 Ariz. 74, ¶ 8, 179 P.3d 954, 956 (App. 2008), we review that decision for an abuse of discretion, deferring to the justice court's factual determinations, but reviewing its legal

conclusions de novo, *see State v. Zamora*, 220 Ariz. 63, ¶ 7, 202 P.3d 528, 532 (App. 2009). Once a defendant "make[s] a prima facie case for suppression," *State v. Hyde*, 186 Ariz. 252, 268, 921 P.2d 655, 671 (1996), the state must demonstrate, by a preponderance of the evidence, "the lawfulness in all respects of the acquisition of all [contested] evidence," Ariz. R. Crim. P. 16.2(b).

¶5 A person is entitled to be informed of certain procedural rights before being subjected to custodial interrogation, including "the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, 384 U.S. at 479. A defendant may waive these rights, but law enforcement officials may not "reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Edwards v. Arizona*, 451 U.S. 477, 485 (1981).

¶6 Whether an accused has invoked his right to counsel requires an objective inquiry into whether there was "'at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.'" *Davis v. United States*, 512 U.S. 452, 459 (1994), *quoting McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991). As we described above, the evidence plainly supports the justice court's finding that Ruiz had invoked his right to counsel. Although the respondent judge found there had been "no unambiguous assertion of [Ruiz's] right to counsel," the record demonstrates otherwise. Indeed, the respondent acknowledged that Ruiz had "asked to speak to a lawyer."

¶7 The respondent judge apparently determined Ruiz's invocation of his right to have counsel present was insufficient because he failed to ask for the specific assistance of counsel "while he was being questioned."[2] In *McNeil*, 501 U.S. at 178, the Supreme Court stated that the re-initiation rule of *Edwards* applies where the suspect has made "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*." (Emphasis in original). For example, a defendant who had invoked his Sixth Amendment right to counsel at a bail hearing did not thereby invoke his Fifth Amendment right to the presence of counsel during subsequent questioning on an unrelated charge. *Id.* at 178-79. In *United States v. Wright*, the Ninth Circuit stated that "*McNeil* strongly suggests that *Miranda* rights may not be invoked in advance outside the custodial context." 962 F.2d 953, 955 (9th Cir. 1992) (holding counsel's request during plea hearing to be present at interviews did not insulate suspect from subsequent custodial interrogation about unrelated matter). However, several federal appellate courts have defined "custodial interrogation" to include the period of time when interrogation is imminent. *See, e.g.*, *United States v. Grimes*, 142 F.3d 1342, 1348 (11th Cir. 1998) (*Miranda* rights may be invoked only during custodial interrogation or when interrogation imminent); *United*

[2]Apparently relying on the respondent judge's conclusion, the state suggests on review that Ruiz's invocation of his right to counsel was limited or qualified because he did not ask "for a lawyer to be present." But it cites no authority supporting the position that Ruiz's invocation was qualified, and identifies nothing in the record supporting that claim. Indeed, the state conceded at the suppression hearing that Ruiz had invoked his right to counsel. Moreover, the state does not contest Ruiz's statement of facts on review, including that he had "requested the opportunity to consult with counsel prior to interrogation."

States v. LaGrone, 43 F.3d 332, 339 (7th Cir. 1994) ("[I]n order for a defendant to invoke his *Miranda* rights the authorities must be conducting interrogation, or interrogation must be imminent."); *United States v. Kelsey*, 951 F.2d 1196, 1198, 1199 (10th Cir. 1991) (that suspect invoked right before police required to read *Miranda* warnings irrelevant). The state does not cite, nor do we find, any authority expressly rejecting this sensible approach. And we discern no principled reason to require a defendant who invokes his right to counsel when interrogation is imminent to reassert that right when interrogation actually begins. *Cf. State v. Atwood*, 171 Ariz. 576, 617, 832 P.2d 593, 634 (1992) (custodial interrogation inherently coercive), *disapproved of on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001).

¶8 In this case, the arresting officer acknowledged the DUI investigation had begun when Ruiz was pulled over and before he was transported to the DPS station. Ruiz had been arrested, handcuffed, and transported to the station before he invoked his right to counsel. Ruiz requested an attorney after he refused a blood draw, but before he was read the *Miranda* warnings and questioned; those events occurring approximately ninety minutes after his arrest. The state presented no evidence that Ruiz's invocation was limited to discussing the blood draw with his attorney or that questioning was not imminent at the time of his invocation. Although unclear, it appears Ruiz was given the *Miranda* warnings roughly contemporaneously with the blood draw. Under these circumstances, the justice court did not err in suppressing his subsequent statements as his invocation "reasonably [could have been] construed to be an expression of a desire for

the assistance of an attorney in dealing with custodial interrogation by the police." *McNeil*, 501 U.S. at 178 (emphasis omitted).

¶9 We also find incorrect the respondent judge's suggestion that Ruiz's right to counsel was satisfied because, "[a]lthough [he] asked to speak to a lawyer, he was allowed to speak to a lawyer by telephone." "[W]hen counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990); *see also Miranda*, 384 U.S. at 474 ("If the individual states that he wants an attorney, the interrogation must cease until an attorney is present."). In *Minnick*, 498 U.S. at 153, the Court explicitly rejected the suggestion that consultation with an attorney is sufficient to satisfy the requirement that counsel must be present for questioning after an accused invokes the right to counsel. The Court reiterated the concern that "'[e]ven preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Thus the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.'" *Id.* at 154, *quoting Miranda*, 384 U.S. at 470.

¶10 The state does not contest Ruiz's statement that the officer "re-initiated interrogation of Ruiz without the presence of counsel." Because Ruiz had invoked his right to counsel, and because the state offered no evidence that the scope of his

invocation was limited, consultation with counsel before questioning does not satisfy the requirement that counsel be present before officials initiate an interrogation.

¶11 The respondent judge also noted the officer had given Ruiz the warnings required by *Miranda* before questioning him. Once an accused has invoked the right to counsel, "a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards*, 451 U.S. at 484. Once a suspect asserts the right to counsel, "the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards." *McNeil*, 501 U.S. at 176-77. Therefore, the fact officers read Ruiz the *Miranda* warnings before initiating interrogation did not satisfy his right to counsel.

¶12 For the same reason, we reject the state's argument on review that Ruiz subsequently waived his right to counsel. Relying on the United States Supreme Court's recent decision in *Berghuis v. Thompkins*, __ U.S. __, 130 S. Ct. 2250 (2010), the state argues Ruiz waived that right, as well as his right to remain silent, by answering the officer's questions after being read the *Miranda* warnings. In *Berghuis*, the Supreme Court concluded a suspect's decision to answer questions after being read his rights pursuant to *Miranda* constituted a knowing, voluntary, and intelligent waiver of his right to remain silent. __ U.S. at __, 130 S. Ct at 2262-63. We find *Berghuis* inapposite. There, the defendant had not invoked his rights either before or after being read the

Miranda warnings. *Id.* Ruiz, in contrast, did so by requesting that he be allowed to speak to an attorney. And, as we have explained, because interrogation was imminent, his invocation was sufficient to encompass his right to have an attorney present during that interrogation. Thus, the state was not permitted to question him further without his attorney present. Any waiver of his right to silence or right to an attorney during that questioning is presumed to be involuntary.

¶13 For the reasons stated, we vacate the respondent judge's order reversing the justice court's grant of Ruiz's motion to suppress his statements to officers.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

Chief Judge Howard and Judge Espinosa concurring.